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Nos. 03-334 and 03-343

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In The
Supreme Court of the United States

SHAFIQ RASUL, et al.,

Petitioners,

v.

GEORGE W. BUSH, President of the United States, et al.,

Respondents.

and

FAWZI KHALID ABDULLAH FAHAD AL ODAH, et al.,

Petitioners,

v.

UNITED STATES, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF *AMICI CURIAE* BIPARTISAN COALITION OF NATIONAL AND INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS IN SUPPORT OF PETITIONERS

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STATEMENT OF *AMICI*

Amici are a bipartisan group of organizations with widely varying agendas and values that come together in this brief to support a single proposition: there must be review of the legality of Executive detention.[1]

Three are human rights organizations. Since 1978, the **Lawyers Committee for Human Rights** (LCHR) has worked in the United States and abroad to create a secure and humane world by advancing justice, human dignity and respect for the rule of law. LCHR believes this case presents an issue at the heart of its work to ensure that domestic legal systems incorporate international human rights protections. **Amnesty International** (AI) is a non-governmental organization working to ensure that every person enjoys all human rights. It is independent of any political ideology or economic interest. It was founded in 1961 and has a worldwide membership. AI bases its work on internationally-recognized human rights standards. It believes that there can be no land without law and no executive detention without judicial remedy. In line with its international focus, AI joins this brief on matters of international law. **Human Rights Watch** is a nonprofit organization established in 1978 that investigates and reports on violations of fundamental human rights in over 70 countries worldwide with the goal of securing the respect of these rights for all persons. It is the largest international human rights organization based in the United States. By exposing human rights abuses committed by state and non-state actors, Human Rights Watch seeks to bring international public opinion to bear upon offending governments and others to end abusive practices.

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[1] Letters of consent to the filing of this brief accompany this brief. No counsel for a party authored this brief in whole or in part and no person, other than *Amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

Nine are legal organizations. The **American Civil Liberties Union** (ACLU) is a nationwide, nonpartisan, nonprofit organization with more than 400,000 members dedicated to the principles of liberty and equality embodied in the Constitution and reflected, as well, in numerous international treaties and norms. Since its founding in 1920, the ACLU has frequently appeared before this Court in cases involving an alleged conflict between national security and individual liberty, and has repeatedly defended the role of habeas corpus as a time-tested guarantor of basic human rights. The **Anti-Defamation League** (ADL) was founded in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to secure justice and fair treatment to all citizens alike. To that end, ADL speaks as both an advocate for civil rights and liberties and as an aggressive supporter of law enforcement and the government's important efforts to fight international terrorism. ADL believes that judicial review is fundamental to the success of these efforts. The **Association of the Bar of the City of New York**, founded in 1870, is a 22,000-member organization devoted to preserving legal institutions, promoting reform of the law and improving the administration of justice. While most of its members practice in the New York City area, the Association has members in nearly every state and over 50 nations. The Association has submitted *amicus curiae* briefs and educated the bar and the public regarding legal issues in the context of the "war on terrorism." The **Law Society of England and Wales** is the professional body representing more than 110,000 solicitors in England and Wales. It is concerned to see the independence of the legal profession, the rule of law and human rights upheld throughout the world. We recognise the need for governments to reassess their security needs and to tackle the potential threat posed by international terrorism. However, it is essential that the correct balance is struck between the legitimate aim of protecting the country and upholding the principles of fairness and justice. The **National Association of Criminal Defense Lawyers** (NACDL) has more than 10,000 members nationwide and

28,000 affiliate members in 50 states. Founded in 1958 to advance and disseminate knowledge in the area of criminal practice and to encourage integrity, independence, and expertise among criminal-defense counsel, NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving the line between civilian and military law. The **National Association of Social Workers, Legal Defense Fund** (NASW LDF) is a subsidiary of the National Association of Social Workers (NASW), the largest association of professional social workers in the world. It has been in existence for thirty years to provide support for legal cases and issues of concern to NASW members and the social work profession. NASW supports the adoption of human rights as a foundation principle upon which all of social work theory and applied knowledge rests, including the right not to be subjected to dehumanizing punishment. **People For the American Way Foundation** (People For) is a non-partisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by civic, religious, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For now has over 600,000 members and supporters nationwide. One of People For's primary missions is to educate the public on the vital importance of our tradition of liberty and freedom, and to defend that tradition, including due process rights, through litigation and other means. The **Rutherford Institute** (Institute) is a nonprofit civil liberties organization founded in 1982 by its President, John W. Whitehead. The Institute educates and litigates on behalf of constitutional and civil liberties, and attorneys affiliated with the Institute have appeared as counsel or submitted *amicus curiae* briefs in many significant civil liberties and human rights cases. Institute attorneys currently handle several hundred civil rights cases nationally at all levels of federal and state courts. **Trial Lawyers for Public Justice** (TLPJ) is a national public interest law firm dedicated to using trial lawyers' skills and approaches to create a more just society.

Through precedent-setting litigation, TLPJ prosecutes cases throughout the country designed to enhance consumer and victims' rights, environmental protection, civil rights and liberties, our civil justice system, and the protection of the poor and powerless. TLPJ is committed to ensuring that the United States continues to provide – and stand throughout the world as a beacon for – access to justice.

Four represent the millions of Americans whose religious faith or culture helps define their values. The **American Jewish Committee** (AJC), a national organization with over 125,000 members and supporters, was founded in 1906 to protect the civil and religious rights of Jews. It is the conviction of AJC that those rights will be secure only when the civil and religious rights of all Americans are equally secure. AJC believes that striking the appropriate balance between enhancing our national security and defending our liberties allows petitioners access to courts to challenge their detention. **Islamic Circle of North America** (ICNA Relief) provides case management, advocacy, and direct relief to the needy in accordance with the tenets of Islam. The agency's original charge was to concentrate on local problems around the U.S., while not neglecting disaster relief overseas. The ICNA Relief 911 program provides emergency financial and legal support for hundreds of Muslim, Arab and South Asian detainees and their families, as well as others affected directly by the September 11th terror attacks. The **National Council of the Churches of Christ in the USA** (NCC), founded in 1950, is the leading force for ecumenical cooperation in the United States. The NCC's 36 Protestant, Anglican and Orthodox member denominations include more than 50 million persons in 140,000 local congregations in communities across the nation. The NCC, as a religious organization, is interested from a moral standpoint in the right to due process, which is being denied the detainees in Guantanamo. The **Union for Reform Judaism** (URJ) is the congregational arm of the nation's largest Jewish denomination, encompassing 1.5 million people across North America. In this age of terrorism, as we strive to strike the appropriate balance

between cherished, constitutionally protected freedoms and national security, we turn to Jewish law for guidance, which mandates the just treatment of strangers among us. Therefore, URJ opposes indefinite detention and administrative rulings that deny individuals due process.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Petitioners in this case claim that they never "engaged in hostilities against America." *Odah v. United States*, 321 F.3d 1134, 1140 (D.C. Cir. 2003). They say they are innocents caught up in the fog of war, and they have now been imprisoned for more than a year and a half. *Id.* at 1136-37, 1140. Yet according to the Court of Appeals, no court has jurisdiction to hear their claims. The Court of Appeals did not base its decision on the principle that courts must shy from the battlefield, since the Petitioners were moved far from the fields of war long ago. According to the Court of Appeals, the principle is simpler: the Executive can do what it wishes to aliens abroad – even innocent aliens – because no law protects them and no court may hear their pleas.

That is a stunning proposition, and *Amici* emphatically reject it. As this Court taught in *Ex Parte Quirin*, "the duty . . . rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty." 317 U.S. 1, 19, 25 (1942) (holding that "neither the [Presidential] Proclamation nor the fact that [petitioners] are enemy aliens forecloses consideration by the courts of petitioners' contentions").

The Court of Appeals decision suffers from three major flaws. *First*, it wrongly concludes that "[i]f the Constitution does not entitle the detainees to due process . . . they cannot invoke the jurisdiction of our courts to test the . . . legality of restraints on their liberty." *Id.* at 1141. The writ of habeas corpus is not so limited. It provides a means to challenge Executive detention on the basis of any law of the United States – not just the Constitution. *See* 28 U.S.C. § 2241(c) (extending writ to any person "in custody in violation of the Constitution or laws or treaties of the

United States."). The Geneva Convention Relative to the Treatment of Prisoners of War (GPW), 6 U.S.T. 3316, 75 U.N.T.S. 135, ratified by the United States, is one such law, and Petitioners have non-frivolously claimed that their detention violates the terms of that convention.

Second, the Constitution *does* entitle the Guantanamo detainees to due process. The flexible standard of due process enunciated in *Mathews v. Eldridge*, 424 U. S. 319 (1976), provides a context-sensitive means to balance the real concerns of national security with the equally real possibility of an erroneous deprivation of freedom. *Mathews* makes clear that courts can protect national security without blinding themselves to the claims of those aliens held abroad by U.S. officials. Furthermore, any number of this Court's cases, such as *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), make clear that even those extraterritorial aliens with no property or presence in this country have *some* due process rights.[2] If the Due Process Clause protects an alien corporation with no presence in this country from having to defend itself in a U.S. court, it would be perverse to think that the clause does not protect an alien individual from indefinite detention without any court review at all.

Were the Due Process Clause inapplicable to U.S. actions in Guantanamo Bay, then the Constitution would allow the summary execution or torture of prisoners detained there. Indeed, the government has conceded this in open court. *See Gherebi v. Bush*, 2003 WL 22971053, at *13 (9th Cir. Dec. 18, 2003) ("[A]t oral argument, the government advised us that its position would be the same

[2] This brief addresses only whether Guantanamo detainees who have received *no* process may maintain a habeas petition because that, in fact, is the status of all the current detainees at Guantanamo, including Petitioners. The brief does not address the separate and at this point purely hypothetical question of the availability and scope of habeas review for Guantanamo detainees who receive the review process that these petitioners have been denied.

even if the claims were that it was engaging in acts of torture or that it was summarily executing the detainees. To our knowledge, prior to the current detention of prisoners at Guantanamo, the U.S. government has never before asserted such a grave and startling proposition."). Of course, there are forces external to the Constitution that might moderate such atrocities. But the very idea that the Constitution would have nothing to say about such matters is inimical to the principle of fair treatment at the heart of the Due Process Clause.

Third and finally, the Court of Appeals' construction of both the habeas statute and the Due Process Clause flouts the "values we share with a wider civilization." *Lawrence v. Texas*, 124 S. Ct. 2472, 2483 (2003); *Atkins v. Virginia*, 536 U.S. 304, 317 n.21 (2002). The very decision that the Court of Appeals most frequently cites – *Johnson v. Eisentrager*, 339 U.S. 763 (1950) – was based in good part on comparative and international law. In the more than half-century since, that law has changed dramatically. Democratic allies around the world that have confronted ongoing terrorist threats, as well as the international treaties that the United States has ratified, provide for judicial review of the legality of Executive detention.

This shared practice of reviewing detentions, mirrored in our own habeas statute, is the surest guarantee of the protection of innocents. As Respondent Secretary of Defense Rumsfeld has acknowledged, soldiers in wartime sometimes make mistaken captures.[3] History more than supports the Secretary's acknowledgement. When U.S. soldiers captured presumed belligerents in the conflicts in Vietnam and Iraq, competent tribunals were quickly

[3] *See, e.g.*, U.S. Dept. of Defense (DOD), News Transcript (Jan. 27, 2002) ("Sometimes when you capture a big, large group there will be someone who just happened to be in there that didn't belong in there.") (remarks of Secretary of Defense Donald H. Rumsfeld). All DOD releases and briefings cited in this brief can be found on the DOD website at www.defenselink.mil.

convened to determine whether those caught were truly combatants – and if so, whether they were entitled to prisoner-of-war status. Many were released. *See generally* U.S. MILITARY JUDGE ADVOCATE GENERAL OPERATIONAL LAW HANDBOOK (M. Lacey and B. Bill eds., 2000).

Convening those tribunals was both legally proper and wise. As Justice Jackson noted three years after *Eisentrager*, review of governmental action "is not for the sole benefit of an accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice." *Shaughnessy v. Mezei*, 345 U.S. 206, 224-25 (1953) (Jackson, J., dissenting). This nation's courts must have jurisdiction to protect our system of justice from those "lasting stains."

STATEMENT OF FACTS

The United States now holds approximately 660 people at its military base at Guantanamo Bay, Cuba.[4] Charles Savage, *U.S. Releases 20 Detainees, Transfers 20 More to Cuba*, BOSTON GLOBE, Nov. 25, 2003. Of those brought to the base, about 84 have been released. *Id.* Two have been given military lawyers.[5] The United States has permitted access to the rest only to the International Committee of the Red Cross – the organization charged

[4] The United States controls Guantanamo Bay under a perpetual lease with Cuba that grants the United States "complete jurisdiction and control over and within said areas." Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 23, 1903, art. III, T.S. No. 418 (14a); *see also* Treaty Between the United States of America and Cuba Defining Their Relations, May 29, 1934, U.S.-Cuba, art. III, T.S. No. 866 (confirming and extending lease terms). The lease can be terminated only if the United States consents. The Cuban Foreign Ministry has repeatedly acknowledged that it has "no jurisdiction" over the base. *See, e.g.*, *Havana Mute on U.S. Plan for Detainees*, PERISCOPE DAILY DEFENSE NEWS, Jan. 2, 2002.

[5] DOD News Release, DOD Assigns Legal Counsel for Guantanamo Detainee (Dec. 3, 2003); DOD News Release, Defense Counsel Assigned to Salim Ahmed Hamdan (Dec. 18, 2003).

with monitoring compliance with the Geneva Conventions – and some foreign diplomatic officials. Bob Drogin, *No Leaders of Al Qaeda Found at Guantanamo*, L.A. TIMES, Aug. 18, 2002.

The U.S. Department of Defense has asserted that the Guantanamo prisoners, nearly all of whose identities have not been officially disclosed, are "battlefield" detainees who were engaged in combat when arrested.[6] But in addition to Petitioners' claims of non-combatancy, it is clear that some detainees were apprehended far from battlefields. For instance, Guantanamo holds six Bosnians and Algerians who were arrested by Bosnian police in Bosnia and then handed over to U.S. troops at the request of the United States. *See US Embassy in Bosnia Says 6 Al Qaeda Suspects Sent to Cuba*, AGENCE FRANCE PRESSE, Jan. 24, 2002. They were quickly transported to Guantanamo, despite a Bosnian court order that four of the men remain in Bosnia for further proceedings. Daniel Williams, *Hand-Over of Terrorism Suspects to U.S. Angers Many in Bosnia*, WASH. POST, Jan. 31, 2002.[7] "The Americans wanted the Algerians and got them," said Vlado Adamovic, a judge on the Bosnian Federation Supreme Court. "As a citizen, all I can say is it was an extra-legal procedure." *Id.*

The Guantanamo detainees have become the subject of widespread international concern over the past two years. In November 2003, the International Committee of the Red Cross broke its traditional rule of silence, publicly expressing its concern about the "unresolved" status of the detainees:

[6] In March 2002, for example, Department of Defense General Counsel William Haynes described the Guantanamo detainees as "enemy combatants that we captured on the battlefield seeking to harm U.S. soldiers or allies." DOD News Briefing on Military Commissions, DefenseLINK (Mar. 21, 2002).

[7] *See also* Lawyers Committee for Human Rights, *Assessing the New Normal: Liberty and Security for the Post September 11 United States*, at 84-85 (2003).

> The ICRC's main concern today is that the US authorities have placed the internees in Guantanamo beyond the law. This means that, after more than eighteen months of captivity, the internees still have no idea about their fate, and no means of recourse through any legal mechanism . . . .[¶] This has prompted the ICRC to ask the US authorities to institute a due legal process in accordance with the judicial guarantees stipulated by international humanitarian law. This process should formalize and clarify the fate of each and every individual in Guantanamo and put an end to the seemingly open-ended system of internment that currently exists.

International Committee of the Red Cross, *Guantanamo Bay: Overview of the ICRC's Work for Internees*, Nov. 6, 2003.

Serious criticism has also come from some of the United States' staunchest allies, including nations engaged in their own longstanding battles against terrorist organizations. Several days after the ICRC announcement, Judge Steyn, one of Britain's most senior judges, denounced the Guantanamo camp as a "monstrous failure of justice," emphasizing that "[t]he purpose of holding the prisoners at Guantanamo Bay was and is to put them beyond the rule of law, beyond the protection of any courts, and at the mercy of the victors." Lord of Appeal Johan Steyn, Guantanamo Bay: The Legal Black Hole, Address at the Twenty-Seventh F.A. Mann Lecture, Nov. 25, 2003. That same month, Spanish Foreign Minister Ana Palacio called the indefinite detentions at Guantanamo a "major error" and urged this Court to "open a path" to end the "legal limbo." *Long Term Detention of Guantanamo Suspects Called a 'Major Error,'* TORONTO STAR, Nov. 12, 2003.

The Executive appears to intend to use Guantanamo as a long-term offshore detention center free from judicial

review.[8] Two years after the first detainees arrived, the center has begun to show signs of permanence. On April 28, 2002, the detainees were transferred from the makeshift open-aired cells of Camp X-Ray to the permanent, rigid steel mesh cells of Camp Delta. Elisabeth Frater, *Guantanamo Gets a Makeover*, NAT'L J., May 4, 2002. The United States is now building a fifth camp inside Camp Delta. This camp, a hard-sided concrete building, will increase detainee capacity from 1,000 to 1,100 by mid-2004. Charles Savage, *Camp Expansion Indication of U.S. Stance on Military's Detainees*, MIAMI HERALD, Aug. 26, 2003.

ARGUMENT

I. THE FEDERAL COURTS HAVE JURISDICTION TO HEAR PETITIONERS' HABEAS CLAIMS

The federal habeas statute under which Petitioners bring their claims, 28 U.S.C. § 2241(c), states that the writ of habeas corpus extends to any person "in custody in violation of the Constitution or laws or treaties of the United States." There are at least two laws of the United States that Petitioners claim their current custody violates: the Due Process Clause of the Fifth Amendment, and the GPW, a treaty ratified by the United States. Both claims are non-frivolous and fit squarely within the terms of the habeas statute. The Court of Appeals, relying on *Eisentrager*, held that extraterritorial aliens never have any constitutional rights. The court therefore concluded

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[8] The Department of Defense is preparing for military commission trials, but no detainees have yet been charged. Vanessa Blum, *Military Justice*, LEGAL TIMES, Dec. 29, 2003. No more than several dozen detainees are expected to be tried before military commissions. Neil Lewis, *The Military Tribunals: Rules on Tribunal Require Unanimity on Death Penalty*, N.Y. TIMES, Dec. 28, 2001. The Executive has claimed that even if a detainee is acquitted by a military tribunal, he may still be held indefinitely at Guantanamo as an "enemy combatant." Laura Sullivan, *Bush Lists 6 for Terror Trials*, CHICAGO TRIB., July 4, 2003.

that there could be no jurisdiction to hear the detainees' claims, which were presumed to rely only on the Constitution. That conclusion contains within it two important errors, each of which requires reversal.

First, it ignored the fact that the habeas statute provides for jurisdiction over claims that custody violates the "*treaties* of the United States." 28 U.S.C. § 2241(c) (emphasis added). Because Petitioners claim that their custody violates the GPW – indisputably a "treat[y] of the United States" – federal courts have jurisdiction to consider the merits of at least those claims.[9]

Second, *Eisentrager* does not resolve the very different issues presented by this litigation. In *Eisentrager*, the parties contested the availability of a *second* assessment of the legality of detention: *post-conviction* habeas relief following a criminal conviction by a military tribunal that, via conviction, had determined the legality of the petitioners' detention. Here, the parties argue over whether due process requires *any process at all* by which detainees can contest the legality of their detention.[10] Petitioners' claim –

[9] This brief addresses the legal issues related to individuals, like Petitioners, assertedly seized on or near battlefields. It does not address the potentially different legal situation of those Guantanamo detainees who were seized in non-battlefield settings, such as Bosnia, whose claims are not now before this Court and as to whom applicable law may differ.

[10] Moreover, the opening sentences of the *Eisentrager* opinion carefully circumscribed the legal issue presented by describing the "ultimate question" as whether the civil courts of the United States possessed the jurisdictional authority to entertain writs brought on behalf of enemy aliens who were captured in China, tried and found guilty in that country by a U.S. military commission for violating the laws of war, and then held in custody at an American military prison in Germany. 339 U.S. at 765-66. The Court resolved this jurisdictional question by concluding that the continued imprisonment of the enemy aliens in *Eisentrager* did not violate their due process rights, and therefore, the U.S. courts were without jurisdiction to hear their habeas claims. The Court's ruling, however, was closely tied to the facts, which are emphasized throughout the opinion. Reflecting that approach, the

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that the Due Process Clause entitles them to at least some process to challenge the legality of their detention – was not decided in *Eisentrager*.[11] This claim cannot possibly be characterized as frivolous and falls well within the habeas statute's provision of jurisdiction over any person "in custody in violation of the Constitution . . . of the United States." 28 U.S.C. § 2241(c).[12]

A. Habeas Jurisdiction Is Proper Because Petitioners Claim That Their Ongoing Executive Detention Violates The Geneva Conventions

The federal habeas corpus statute expressly provides Petitioners with a cause of action over which the federal

Court articulated the limits of its Due Process analysis in the following terms: "We hold that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States." 339 U.S. at 785. No wider lesson can or should be drawn from *Eisentrager*.

[11] Additionally, the detainees in *Eisentrager* were being held on territory that our government held as an occupying power but over which it exerted no claim of exclusive dominion. By contrast, Petitioners in this case are being held in territory over which the United States possesses exclusive authority and control under a leasehold arrangement that can continue in perpetuity in the sole discretion of the United States government. *See generally* Brief of Former U.S. Government Officials.

[12] These errors may perhaps best be explained by the circuit court's indifference to the plain text of the statute. As the Court of Appeals acknowledged, it viewed the "particular jurisdictional language" of the habeas statute as irrelevant in determining jurisdiction, choosing to conclude instead that it could apply a standardless rule in which "everything turn[s] on the circumstances of those seeking relief, on the authority under which they [are] held, and on the consequences of opening the courts to them." *Odah*, 321 F.3d at 1145. The panel cited no authority for its remarkable conclusion that the very *language* of the habeas statute is irrelevant when determining whether that statute provides jurisdiction.

district court has jurisdiction. The statute gives federal courts the power to grant the writ of habeas corpus to a person held in "custody in violation of the . . . *treaties* of the United States." 28 U.S.C. § 2241(c)(3) (emphasis added). The Court of Appeals ignored the plain language of the statute, erroneously conflating the writ and the Constitution. *Compare INS v. St. Cyr*, 533 U.S. 289, 302-03 (2001) (rejecting "suggestion that habeas relief in cases involving Executive detention was only available for constitutional error"), *with Odah*, 321 F.3d at 1141 ("If the Constitution does not entitle the detainees to due process . . . they cannot invoke the jurisdiction of our courts to test the . . . legality of restraints on their liberty."). As the U.S. Military has itself long recognized, the GPW provides a rule by which this habeas petition must be judged. *See* Dep't of the Army, LAW OF WAR WORKSHOP DESKBOOK ch. 5, § IV(E)(3), at 85 (Brian J. Bill ed., 2000) [hereinafter LAW OF WAR WORKSHOP DESKBOOK] (stating that prisoners of war "have standing to file a Habeas Corpus action . . . to seek enforcement of their GPW rights"). Because Petitioners non-frivolously claim that their detention violates the Convention, the District Court had jurisdiction under 28 U.S.C. § 2241(c)(3) to hear their claims.[13]

There can be little doubt that Petitioners' claims are at least non-frivolous. The GPW requires all contracting parties to treat those taking part in the armed conflict as POWs "from the time they fall into the power of the enemy

[13] Whether ~~or not~~ Article 5 of the GPW is "self-executing" and provides a cause of action in U.S. courts, it clearly provides a rule of decision for an action brought under the habeas statute, 28 U.S.C. § 2241. *See generally* Brief of Former Prisoners Of War and Experts On The Law Of War, filed in support of certiorari in *Hamdi v. Rumsfeld*. As that brief explains, *Eisentrager*'s conclusion about the solely diplomatic enforceability of the 1929 Geneva Conventions, 1929 Convention Relative to the Treatment of Prisoners of War, art. 82(1), July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343, has no bearing on the proper use as a rule of decision of the 1949 GPW, which has different text and different drafting and ratifying histories.

and until their final release and repatriation." Convention, art. 5, 6 U.S.T. 3316, 3322, 75 U.N.T.S. 135, 140 [hereinafter Article 5]. There is one – and only one – exception to that requirement:

> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories [deserving of POW status], such persons shall enjoy the protection of the present Convention *until such time as their status has been determined by a competent tribunal*.

Id. at 3324 (emphasis added).[14]

The meaning of this clear language has been undisputed by the United States since its ratification of the Convention in 1955. Every department of the U.S. military has incorporated the language of the Convention directly into its binding regulations regarding the treatment of wartime detainees:

> In accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present

[14] U.S. officials have asserted that no Article 5 tribunals are needed because there is not "any doubt" that those detained at Guantanamo are ineligible for POW status. As the Statement of Facts, *supra*, and Part III, *infra*, make clear, this assertion has been widely rejected. That is because there are strong grounds for concluding that some detainees are either entitled to POW status under the Third Geneva Convention (e.g., members of regular Afghan armed forces) or are civilians entitled to protected person status under article 4 of the Fourth Geneva Convention, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. *See* ICRC *Commentary*, Fourth Geneva Convention, art. 4 ("nobody in enemy hands can be outside the law"). In any event, the U.S. Executive's view has not been tested through any review process available to detainees.

> Convention *until such time as their status has been determined by a competent tribunal.*

Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* § 1-6(a) (1997) (emphasis added) [hereinafter AR 190-8].[15]

Indeed, these sources explicitly provide detainees the opportunity to assert not only POW status, but also *innocence*. The multi-force regulation, for instance, authorizes a competent tribunal to determine whether a detainee is in fact an "innocent civilian," AR 190-8, §1-6(e)(10), i.e., to assess the sort of claim that Petitioners make here.

These military regulations accord with the practices faithfully adhered to by the U.S. military in every major conflict since World War II. During the Korean War, the United States military treated captured Chinese soldiers as POWs under the Convention, even though neither the U.S. nor China were then parties to the Geneva Conventions.[16] During the Vietnam War, the United States military reiterated that "Article 5 [of the GPW] requires that the protections of the Convention be extended to a person who has committed a belligerent act and whose entitlement to Prisoner of War . . . status is in doubt *until such time as his status has been determined by a competent*

[15] This regulation was jointly promulgated by the Headquarters of the Departments of the Army, Navy, Air Force, and Marine Corps, Washington, D.C., October 1, 1997. The same authoritative source directs that a "competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status . . . who asserts that he or she is entitled to treatment as a prisoner of war . . . " AR 190-8, §1-6(b). Furthermore, U.S. Navy regulations advise naval officers that "individuals captured as spies or as illegal combatants *have the right to assert their claim of entitlement to prisoner-of-war status before a judicial tribunal and to have the question adjudicated.*" Dep't of the Navy, NWP 1-14M: *The Commander's Handbook on the Law of Naval Operations* 11-3 (1995) (emphasis added).

[16] Human Rights Watch, *Background Paper on Geneva Conventions and Persons Held by U.S. Forces* (2002), *available at* http://www.hrw.org/backgrounder/usa/pow-bck.htm.

tribunal." U.S. Military Assistance Command for Vietnam, Directive No. 20-5 § 2(a) (Mar. 15, 1968), *reprinted in Contemporary Practice of the U.S. Relating to Int'l Law*, 62 Am. J. Int'l L. 754, 768 (1968) (emphasis added). The Vietnam directive explicitly identifies the Convention as "applicable law," *id.* at 771, and proclaims that "[n]o person may be deprived of his status as a prisoner of war without having had an opportunity to present his case with the assistance of a qualified advocate or counsel." *Id.*

The United States continued this tradition of compliance during the 1991 Persian Gulf War. The U.S. Army convened 1,196 tribunals to determine the status of detained enemy combatants during Operation Desert Storm. Dep't of Defense, CONDUCT OF PERSIAN GULF WAR: FINAL REPORT TO CONGRESS app. L at 578 (Apr. 1992) [hereinafter CONDUCT OF PERSIAN GULF WAR]; LAW OF WAR WORKSHOP DESKBOOK 79. As a result, 310 individuals were granted POW status. Many other detainees who came before the tribunals "were determined to be displaced *civilians* and were treated as refugees." CONDUCT OF THE PERSIAN GULF WAR at 578 (emphasis added).

The Convention's explicit requirements, supported by unwavering military practice, demand that Petitioners be considered POWs unless and until a competent tribunal determines otherwise. No one disputes that the U.S. government has denied Petitioners GPW protections without convening a competent tribunal to determine their status, as required by Article 5. In "violation of . . . the treaties of the United States," 28 U.S.C. § 2241, and a half century of consistent military practice, Petitioners have been denied POW protections and denied a hearing by a competent tribunal under Article 5 of the GPW.

B. Habeas Jurisdiction Is Proper Because Petitioners Claim That Their Ongoing Executive Detention Violates Due Process

The Court of Appeals assumed that Petitioners were non-combatant citizens of friendly nations accidentally caught up in hostilities, *Odah*, 321 F.3d at 1140 ("the cases

before us were decided on the pleadings, each of which denied that the detainees had engaged in hostilities against America"), but nevertheless held that they were "not entitle[d]" to Due Process protections, *id.* at 1141 ("If the Constitution does not entitle the detainees to due process, and it does not, they cannot invoke the jurisdiction of our courts to test the constitutionality or the legality of restraints on their liberty."). It thus concluded that "the writ may [not] be made available to aliens abroad when basic constitutional protections are not." *Id.* Those conclusions (1) mischaracterize the state of the law; (2) fail to recognize the considerable flexibility within the Due Process Clause; and (3) run afoul of this Court's recent Due Process jurisprudence.

1. It is simply not settled whether, or in what manner, the Fifth Amendment applies to non-citizens abroad. *See Miller v. Albright*, 523 U.S. 420, 451 (1998) (noting that "it is unclear whether an alien may assert constitutional objections when he or she is outside the territory of the United States") (O'Connor, J., concurring). That alone should give pause. Where it is unclear whether an underlying right exists, it is particularly inappropriate to find a lack of *jurisdiction* to determine whether the right exists on the basis of a conclusion about the underlying right. Yet that is exactly what the Court of Appeals did here.

The importance of independent review of Executive action is underscored – not undermined – by *Eisentrager* itself, the case on which the Executive now relies so heavily. In *Eisentrager*, the parties contested the availability of a *second* level of review: *post-conviction* habeas relief. But the petitioners in *Eisentrager* had already been convicted: i.e., the legality of their detention had already been assessed by a tribunal. While *Eisentrager* limited the availability of the second level of review, the crucial point is that the petitioners in that case had been afforded a process which led to the release of six of those accused by the government. The *Eisentrager* Court did not take the more extreme step of saying that aliens detained by the United States beyond our shores could be denied *all* process – as the Executive now claims.

That important distinction was not undermined by the decision in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), on which the Court of Appeals also relied. *Verdugo* concerned the criminal trial – not detention without review – of an alien drug kingpin seeking to exclude evidence obtained abroad. The Court concluded that the Fourth Amendment's warrant requirement does not apply to a non-resident alien who challenges a search conducted outside the United States. While *Verdugo* spoke more broadly in a paragraph of dicta, that language played no part in the Court's holding. *See Odah*, 321 F.3d at 1141 (recognizing paragraph's status as dicta).

Concurring in *Verdugo* – and casting the fifth vote – Justice Kennedy avoided rigid line-drawing and found that courts should use a contextual approach in determining whether constitutional rights apply abroad under any given set of facts. Acknowledging that "the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic," he concluded that one must ask "what constitutional standards apply when the Government acts, in reference to an alien, within its sphere of foreign operations." 494 U.S. at 277 (Kennedy, J., concurring). He then observed that the application of the Fourth Amendment's warrant requirement to a search conducted in Mexico would be both "impracticable and anomalous" given the procedural difficulties and oddities that would result from applying to Mexican magistrates and working with Mexican officials, particularly given the varying "and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad." *Id.* at 278.

No such difficulties exist here. As shown below, nations agree that there must be some review of the legality of prolonged detention. *See* part III, *infra*. As important, the provision of some review of the legality of the Guantanamo detentions, unlike the proposed Mexican search warrant process at issue in *Verdugo*, is completely within the control of the United States. There would be no need to work with Cuban officials on such review, and no need to engage in the sort of cultural translation against which Justice Kennedy warned in *Verdugo*.

2. The flexible approach to constitutional extraterritoriality that Justice Kennedy outlined in *Verdugo* comports well with the modern conception of the Due Process Clause, embodied in *Mathews v. Eldridge,* 424 U.S. 319 (1976). The Due Process Clause "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews*, 424 U.S. at 334. Rather, the procedures appropriate to test the legality of a deprivation vary with the circumstances: "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Id.*

Because the Due Process Clause is "flexible," due process rights and judicial review of those rights would not lead to the dire consequences that the Court of Appeals feared. The analysis required by *Mathews* – decided a quarter century after *Eisentrager* – amply protects critical government interests:

> [D]ue process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335.

A court applying the *Mathews* test could therefore account for national security interests – not undermine them by mechanical application of a rigid rule. For instance, it could consider the national interest in not "divert[ing a field commander's] efforts and attention from the military offensive abroad to the legal defensive at home" and not "hamper[ing] the war effort and bring[ing] aid and comfort to the enemy," *Odah*, 321 F.3d at 1139 (quoting *Eisentrager*, 339 U.S. at 779), when determining the process due. But it could also consider the interests that potential innocents have in challenging, in some

forum, the legality of their detention. In short, it could attempt to balance the weighty interests on both sides of the equation.

Such balancing might or might not lead to the procedures detailed in the GPW – a document signed and ratified with the understanding that its provisions for the treatment of enemy combatants would be binding in wartime.[17] But a court asked to find the balance mandated by the Due Process Clause may not simply *assume* that no process is due – and deny jurisdiction on the basis of that assumption.[18]

3. The courts have long recognized that the Due Process assurance of fundamental fairness provides at least *some* protection to extraterritorial aliens who find themselves under the power of the United States. That much is clear from the "minimum contacts" analysis required by *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 113-16 (1987). Under the *Asahi* line of cases, it is precisely those foreign national defendants that have no property *or presence* in the United States – those *without* "minimum contacts" – that are protected by the

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[17] Naturally, U.S. obligations under the GPW could require a GPW Article 5 proceeding whether or not the Due Process Clause independently requires such a proceeding. *See* part I.A., *supra*.

[18] *Amici* do not address *what* process is due at Guantanamo, but they agree that the Due Process Clause requires the nation's courts to ensure *some* process. Whatever process may be appropriate on the battlefield (if any), the Guantanamo detainees have been transported by the Executive branch to a location far from the zone of active hostilities. There, where seizure has morphed into detention and a battlefield has given way to a detention center, *some* process is due. Indeed, as more time passes without a review of the legality of the Guantanamo detentions, the process due may become more substantial. As non-battlefield military detention becomes prolonged, the liberty interest increases – it is worse to lose a year and a half of liberty than a week – and the governmental interest may decline as intelligence becomes stale.

Due Process Clause from defending themselves in the United States. *Contra Odah v. United States*, 321 F.3d 1134, 1141 (D.C. Cir. 2003) (asserting incorrectly that foreign nationals "without property or presence in" the U.S. have "no constitutional rights, under the due process clause or otherwise.").

In *American Dredging Co. v. Miller*, 510 U.S. 443 (1994), for instance, this Court noted that "the Due Process Clause provides an important measure of protection for out-of-state defendants, *especially foreigners*." *Id.* at 462 (emphasis added). This "measure of protection" exists not by grace but by right: the "personal jurisdiction requirement [of the Due Process Clause] recognizes and protects an individual liberty interest." *Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 702 (1982). For that reason, foreign defendants with insufficient contacts in this nation cannot be compelled to defend themselves in our courts – a compulsion that would "offend traditional notions of fair play and substantial justice." *Asahi*, 480 U.S. at 113 (internal quotation marks omitted). As this Court forthrightly explained a year after *Asahi*, "there has been *no question* in this country of excepting foreign nationals from the protection of our Due Process Clause. Under that Clause, foreign nationals are assured of . . . service that provides notice . . . [and] an opportunity to present their objections." *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 705 (1988) (internal quotation marks omitted; emphasis added).

If the Due Process Clause protects nonresident aliens from being unjustly haled into U.S. courts to defend themselves, it certainly protects nonresident aliens from being haled by the U.S. into indefinite detention without even *a chance* to defend themselves. As this Court has noted, "[f]reedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that the [Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

II. ISRAELI, BRITISH, AND INTERNATIONAL LAW ALL REQUIRE REVIEW OF THE LEGALITY OF EXECUTIVE DETENTION

Petitioners' indefinite detention without review undermines the "values we share with a wider civilization, *Lawrence v. Texas*, 124 S. Ct. 2472, 2483 (2003); *Atkins v. Virginia*, 536 U.S. 304, 317 n.21 (2002), and contravenes the "decent Respect to the Opinions of Mankind," THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776), that this nation's founders hoped to earn. This deviance from world practice and opinion is particularly troubling because *Eisentrager* itself was based in good part on international law and practice. *See Eisentrager*, 339 U.S. at 785 (noting "[t]he practice of every modern government"), 786 (citing treaty law), 787-88 (citing the law-of-war Hague Regulations and several secondary sources on international law). Just as Justice Jackson's decision for the Court in *Eisentrager* evaluated the petition in light of the international law of its day, this Court should look to the international law of today.

A. Other Democratic Nations Require Review

The courts of this nation's closest democratic allies – especially those nations with long-term experience combating terrorism, such as the United Kingdom and Israel – have made clear that governments cannot sidestep judicial review and bypass due process protections by holding detainees outside their sovereign territory.

Israeli courts have the power to hear the petitions of non-citizens detained by the Executive outside Israel's sovereign territory. The Supreme Court of Israel began to review the actions of Israeli authorities in the West Bank

and Gaza shortly after Israeli Defense Forces (IDF) captured the territories in the 1967 Six Day War.[19]

The Israeli Supreme Court has explicitly held that the actions of Israeli officials in the territories fall within its jurisdiction. *Ja'amait Ascan v. IDF Commander in Judea and Samaria*, (1982) 37 (4) P.D. 785, 809 (upholding jurisdiction where military commander in occupied territories was fulfilling public duty). The Israeli Supreme Court has never questioned the standing of non-citizen residents in the non-sovereign territories to file suit before it. Kretzmer, *supra,* at 25; *see, e.g.*, *Christian Society for the Holy Places v. Minister of Defense*, (1971) 26 (1) P.D. 574; *Khelou v. Government of Israel*, (1972) 27 (2) P.D. 169, 176-77.

Challenges to Executive detention by the Israeli Defense Forces in the West Bank and Gaza are thus heard regularly in Israeli courts. *See Marab v. IDF Commander in the West Bank*, (2003) 57 (2) P.D. 349, ¶ 32 (Israeli Supreme Court) (finding "judicial review of detention proceedings essential for the protection of individual liberty" and striking down Executive military orders establishing, in West Bank and Gaza, a "special framework regarding detention" that allowed the military to detain for 12-18 days without judicial review). As lawyers in the Military Advocate-General's Unit of the IDF have explained:

> [J]udicial review . . . has not only provided a form of redress for the grievances of Area inhabitants and a safeguard of their rights; it has also provided a powerful symbol and reminder to the officials of the Military Government and Civil Administration of the supremacy of law and legal institutions and of the omnipresence of the Rule of Law wherever Israeli officials' writ may run.

U. Amit-Kohn et al., "Israel, the 'Intifada,' and the Rule of Law," (Tel Aviv: Israel Ministry of Defense Publications, 1993) 17-18 (cited in Kretzmer, *supra,* at 2). In particular, challenges to Executive detention can be brought to the Israeli Supreme Court once available review procedures before the Israeli military courts have been exhausted. *Abu Baker v. Judge of Schehem Military Court*, (1988) 40 (3) P.D. 649.

Like Israeli law, English law gives courts jurisdiction over habeas petitions arising in British "protectorates" outside British *sovereign* territory. In *Ex parte Mwenya*, for example, the English Court of Appeal found that an English court could issue a writ of habeas corpus to an individual detained in Northern Rhodesia – a territory over which the United Kingdom exercised "power and jurisdiction" but not sovereignty. [1960] 1 Q.B. 241 (Eng. C.A.). In so finding, the court rejected the government's argument that English courts lacked jurisdiction to issue writs to territories outside British sovereign control. Lord Evershed explained that jurisdiction

> depend[s] on the extent to which the Crown (or the Crown and Parliament) has in fact assumed and exercises jurisdiction on and over the affairs (and particularly the internal affairs) of the country to the exclusion of any other, or effective, jurisdiction.

Id. at 297. Lord Romer emphasized that "[t]he contrary view would result in a subject having no redress at all if he were detained, however unlawfully, in a protectorate which was in substance a colony but which had no effective courts of its own." *Id.* at 305. Lord Romer made clear that he believed the writ should run to prevent "hardship such as this" in territory in which the Crown "has assumed such a degree of power and control that the protected State is to all intents and purposes a British possession and in which the writ, if issued, would certainly be effective in its results." *Id.*

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[19] *See* DAVID KRETZMER, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES 1 (2002). The West Bank and Gaza are not part of Israeli sovereign territory. *See Salkhaht v. Government of Israel*, (1991) 47 P.D. IV 837 (West Bank is not sovereign but rather "held by Israel by way of military occupation or belligerent occupation").

It was against this legal backdrop that the English Court of Appeal decided the case of Ferroz Ali Abassi, a British citizen detained at Guantanamo Bay since January 2002 who sought to compel the British Foreign Office to make representations to the U.S. government on his behalf. *Abassi v. Sec'y of State for Foreign and Commonwealth Affairs*, [2002] EWCA Civ. 1598. While emphasizing its caution in approaching any allegation that a foreign state is in breach of its international obligations, the *Abassi* court concluded that "in apparent contravention of fundamental principles recognised by both jurisdictions and by international law, Mr. Abassi is at present arbitrarily detained in a 'legal black hole.'" *Id.* at para. 64. Expressing the hope that "the anxiety we have expressed" might be drawn to the attention of the U.S. appellate courts, *id.* at para. 107, Lord Phillips emphasized:

> What appears to us to be objectionable is that Mr. Abassi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal.

Id. at para. 66, 107(iii).[20]

[20] Like the law of the United Kingdom and Israel, European law ensures that all detainees be allowed to challenge the legality of their detention. The (European) Convention for the Protection of Human Rights and Fundamental Freedoms (ECHRFF), Nov. 4, 1950, 213 U.N.T.S. 221, which every member of the European Union has ratified or acceded to, gives a detainee the right to "take proceedings by which the lawfulness of his detention shall be decided. . . . " *Id.* art. 5. The European Court of Human Rights, the supreme adjudicatory body under the European Convention, has clearly held that European governments must provide such review to every individual subject to their jurisdiction and control, even when the individual is outside a State's sovereign territory. Thus, in *Loizidou v. Turkey*, a case concerning the Turkish military presence on Northern Cyprus, the European Court held that "the responsibility of a Contracting Party could also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national

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B. International Law Requires Review

International law requires that Petitioners be given the chance to challenge the legality of their detentions. The International Covenant on Civil and Political Rights (ICCPR) clearly provides that "[*a*]*nyone* who is deprived of his liberty by arrest or detention shall be entitled to proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." ICCPR, art. 9(4), Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 360, 368 (emphasis added).[21] This principle is nothing new. It has had a central place in the Anglo-American legal tradition for nearly eight hundred years, since the Magna Carta, and is protected by a wide range of international legal instruments, decisions, commentaries, and State practice.[22]

territory." App. No. 15318/89, 23 Eur. H.R. Rep. 513 (1996). Similarly, in *Ocalan v. Turkey*, a case concerning a capture in Kenya, the European Court held that Turkey's responsibilities under the European Convention were triggered when Ocalan came within "effective Turkish authority [in Kenya] and was therefore brought within the 'jurisdiction' of that State." App. No. 46221/99, 37 Eur. H.R. Rep. 10, para. 93 (2003).

[21] *See also* U.N. H.R. Comm., General Comment No. 29, ¶16, CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) (ICCPR supreme adjudicatory body concludes that "right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention" is non-derogable).

[22] *E.g.*, Universal Declaration of Human Rights, Dec. 10, 1948, arts. 9-10, G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810; American Declaration of the Rights and Duties of Man ("American Declaration"), May 2, 1948, arts. 15-16, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992); ECHRFF, art. 5; ICCPR, art. 9; American Convention on Human Rights, Nov. 22, 1969, art. 7(5), 1144 U.N.T.S. 123, 9 I.L.M. 673; United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 32, adopted by G.A. Res. 173, U.N. GAOR, 43rd Sess., Supp. No. 49, U.N. Doc. A/43/49 (1988); *see also Restatement (Third) of Foreign Relations Law of*

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There is no exception from this principle for *military* detentions. To the contrary, international humanitarian law – sometimes known as the law of war – clearly provides for review of the legality of military detention. As set forth in detail above, Article 5 of the GPW expressly provides for a hearing when there is doubt as to whether a captured belligerent is entitled to POW status, and may result in the release of persons found to be non-belligerents. *See also* Inter-American Comm'n on H.R. (IACHR), Detainees at Guantanamo Bay, Cuba, Request for Precautionary Measures, 41 I.L.M. 532, 534 (March 12, 2002) (requesting that U.S. ensure that detainees' legal status is determined by competent tribunal in accord with GPW and emphasizing that "no person under the authority and control of a state, regardless of his or her circumstances, is devoid of legal protection for his or her fundamental and non-derogable rights").

Nor is there any exception for offshore putative "legal black hole[s]." *Abassi, supra*, at para. 64. As the Universal Declaration of Human Rights makes clear, "[e]veryone has the right to be recognized *everywhere* as a person before the law." Art. 6 (emphasis added). Moreover, the Universal Declaration explicitly forbids a government's denial of rights premised on "the political, jurisdictional or international status of the country or territory to which a person belongs." *Id.* at art. 2. The ICCPR similarly requires that "[e]ach State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory *and subject to its jurisdiction* the rights recognized in the present Covenant." ICCPR, art. 2(1); *accord López Burgos v. Uruguay*, App. No. 52/1979, CCPR/C/13/D/52/1979 at para. 12.3, 29 July 1981 (ICCPR supreme adjudicatory body holding "it would be unconscionable . . . to permit a State party to perpetrate violations . . . on the territory of

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the United States §702, n.6 (1987) (concluding that "prolonged arbitrary detention," i.e., detention without review, violates international law).

another State, which violations it could not perpetrate on its own territory").

The American Declaration, ratified by the United States, likewise states that "[e]very person has the right to be recognized *everywhere* as a person having rights and obligations, and to enjoy the basic civil rights." American Declaration, art. 17 (emphasis added); *see also Coard v. United States,* Ann. Rep't of the IACHR 1999, Report No. 109/99 (Sept. 29, 1999), 1283 at para. 37 ("Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. . . . [T]he inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control."); *Ferrer-Mazorra v. United States*, Report 51/01, Case 9903 (April 4, 2001), para 179-180 ("OAS Member States are obliged to guarantee the rights under the Declaration to all individuals falling within their authority and control."). For that reason, the IACHR has noted, in the very circumstances now before this Court, that "no person under the authority and control of a state, regardless of his or her circumstances, is devoid of legal protection for his or her fundamental and non-derogable human rights." IACHR, Decision on Request for Precautionary Measures, 41 I.L.M. at 533. Any other principle would lead to impunity for grave breaches of human rights – and might even encourage such breaches in the face of certain impunity.

It is not contested that the United States exercises exclusive authority and control over Guantanamo Bay. International law does not allow the creation of an island outside of law where people are without rights.

CONCLUSION

This Court should hold that jurisdiction is proper and remand to determine two issues on the merits that have not yet been fully briefed: (a) whether wartime detentions without POW status or review by a "competent tribunal" do or do not violate the GPW and (b) whether the Executive has or has not provided whatever process may be constitutionally due Petitioners under the *Mathews v. Eldridge* test. By so doing, it will ensure that our system of justice is not marked by the "lasting stains" that deviation from this nation's proud history – and the practices of our closest allies – would otherwise leave.

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